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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 76-1114

THE PEOPLE OF THE STATE OF CALIFORNIA and the PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Petitioners*,

vs.

SOUTHLAND ROYALTY COMPANY, et al., TEXACO INC., EXXON CORPORATION and MOBIL OIL CORPORATION, *Respondents*.

No. 76-1133

EL PASO NATURAL GAS COMPANY, *Petitioner*,

vs.

SOUTHLAND ROYALTY COMPANY, et al., TEXACO INC., EXXON CORPORATION and MOBIL OIL CORPORATION, *Respondents*.

No. 76-1587

FEDERAL POWER COMMISSION, *Petitioner*,

vs.

SOUTHLAND ROYALTY COMPANY, et al., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONERS THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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ARGUMENT

1. Amicus Curiae, the State of Texas (Texas), in its recitation of the facts of the instant proceeding has indicated that the Federal Power Commission (Commission)[1] "ordered Southland Royalty to sell its gas to El Paso Natural Gas Company (El Paso) for resale to 'low priority customers' in California". (Brief of Texas, p. 2.) Texas further indicates by footnote that this low priority use is as fuel to burn under boilers. This is a use allegedly being phased out in Texas. The reference to the use of gas in California is supposedly obtained from California's Petition for Writ of Certiorari. (Brief of Texas, p. 2, ft. 1.)

This statement is erroneous and misleading to the Court. The natural gas currently being sold in interstate commerce by Gulf Oil Corporation (Gulf) to El Paso under the two leases in dispute is being distributed throughout the El Paso system. El Paso sells natural gas to distributors in Texas, Arizona, New Mexico, Nevada and California. The sale of this gas is subject to the jurisdiction of the Commission.

Texas has taken the reference from California's Petition out of context. In its Petition, California stated that a steadily declining supply of gas to California has caused the curtailment of lower priority customers in California. What is meant by this state-

[1]The Department of Energy Organization Act, Public Law No. 95-91, 91 Stat. 565 (1977) was enacted on August 4, 1977. This Act changed the name of the Federal Power Commission to the Federal Energy Regulatory Commission. This change does not have a substantive effect on the instant case.

ment is that under current supply scenarios California distributors can only be sure of serving the highest priority human needs customers on a noninterruptible basis. Each withdrawal of a large supply of gas from the interstate market becomes more and more unacceptable in terms of endangering high priority customers. California would have no difficulty in supplying the Court with data as to its citizens' needs for gas and its declining supply picture. Certainly the definition of "low priority customers" as used by California includes the same class of industrial customers that Texas indicates will be served by Intratex Gas Company. (Brief of Texas, p. 2.)

The important fact however, as stated above, is that the subject gas is under the jurisdiction of the Commission. Because there is a shortage of gas not only in California but throughout the El Paso interstate system, the Commission has approved a natural gas curtailment plan consisting of five levels of customer priorities that ensures equitable distribution to the entire system regardless of the states involved.[2] That plan provides for curtailment of gas beginning with the lowest priority customers. While Texas alleges that it is phasing out the use of natural gas under boilers in Texas, it is far from inconceivable that low

[2]Federal Power Commission Opinion No. 697, Opinion and Order Prescribing Curtailment Plan and Complying with Court Remand of Interim Plan, issued June 19, 1974 in *El Paso Natural Gas Company*, Docket No. RP72-6 reported at 51 FPC 2053 and Opinion No. 697-A Opinion and Order Clarifying and Modifying Prior Opinion issued December 19, 1974 in *El Paso Natural Gas Company*, Docket No. RP72-6 reported at 52 FPC 1876.

priority industrial customers in Texas, as defined by the Commission, may have their entire needs served due to an abundant supply of intrastate gas. This would be so even though high priority customers served by the interstate gas system face the danger of curtailment.

The Natural Gas Act passed in 1938 was created to fill the gaps in regulation that the individual states could not reach. At that time, the primary aim of the Natural Gas Act was to protect the consumer from the economic stranglehold of interstate pipeline companies.[3] But in recent times of severe shortages the establishment of curtailment plans to ensure that all customers of a pipeline system are treated equitably has been recognized as a legitimate responsibility of the Commission.[4]

California is not suggesting here that the interstate supply problem is an overriding policy issue that must prevail over other issues in the instant decision. What is suggested is that the Texas representation of the Commission and California as instruments used to increase, to a point of luxury, the supply of gas to California consumers at the expense of the Texas economy is wholly unfounded. The Commission, since the passage of the Natural Gas Act, has carried out its responsibilities to see that all interstate consumers

[3] *FPC v. Hope Natural Gas Company*, 320 U.S. 591 (1944).

[4] *FPC v. Louisiana Power and Light Company*, 406 U.S. 621 (1972), *American Smelting and Refining Co. v. FPC*, 494 F.2d 925 (D.C. Cir. 1974).

are treated equitably without endangering the economy of any producing state. If there is any public policy that can be derived from the issues raised by Texas it is that the weakening of the abandonment authorization requirement of the Natural Gas Act cannot be treated lightly when there are shortages in the interstate market and 40% of the natural gas production in the United States is centered in one state.

2. In their briefs, Amici Curiae Texas and the State of Louisiana (Louisiana) argue that approval of the Commission's position in the instant case will throw a cloud over the entire field of oil and gas leases thereby disrupting vital exploration and drilling programs and putting people out of work. (Brief of Texas, pp. 6-16; Brief of Louisiana, p. 4.)

This is a parade of horrors that simply does not exist. Texas goes to great lengths to cite statistics on how many acres of land have been leased for gas exploration and production and how many times each acre has been leased in the past. Louisiana presents a hypothetical situation in which one person acquires a lease of certain property for production purposes, obtains a certificate to sell gas for resale in interstate commerce, then ceases production thereby causing his lease to be terminated. Louisiana then argues that the next person to lease the property for exploration and possible production will never know if his gas has already been dedicated to interstate commerce. Neither brief explains how the case now before the Court can generate the problems envisioned.

Section 7(b) of the Natural Gas Act, the abandonment authorization provision, was enacted as part of the original 1938 Act. It is not a new provision. California is unaware of any general exemption from the abandonment provision that has ever been granted by the Commission. Nor has Texas or Louisiana suggested that there has been a wholesale violation of Section 7(b) in the past. This means that any sale or transportation of natural gas in interstate commerce has required a certificate of public convenience and necessity from the Commission. Any abandonment of such sale or transportation, for whatever reason, has required abandonment authorization from the Commission. The scenario presented by Louisiana exemplifies the improbability of the dangers presented by Amici Curiae. The producer in this hypothetical case would not seek and could not receive a certificate for the sale of gas for resale in interstate commerce unless he had a sufficient amount of gas to sell so that it was economically feasible and in the public interest to sell such gas in interstate commerce. A producer in such a position would hardly abandon production (unless it was in his economic interest to do so through a new lease or a subsequent sale in intrastate commerce). If the producer did cease production, however, notwithstanding the case now before the Court, that producer would have to obtain abandoment authorization from the Commission. Therefore, a new exploration effort, especially one involving a new source of gas, would not be subject to the previous dedication.

It is inconceivable that, as Texas and Louisiana suggest, hundreds or thousands of leased parcels of property will suddenly be charged with a duty to serve the interstate market after this case is decided because a previous lessee violated Section 7(b) of the Natural Gas Act. In actuality, Texas and Louisiana have attempted to reverse the effect of the instant case on the historical operation of the Natural Gas Act. That Act has always required abandonment authorization. If the decision of the Fifth Circuit Court of Appeals is upheld a newly created exemption from the Natural Gas Act abandonment provision will come into being. Certainly the case before the Court does not create the situation Texas and Louisiana fear. Here a new owner is attempting to sell the gas now being sold in interstate commerce to an intrastate buyer without abandonment authorization. The dedication of the gas in question is known to the world. Southland Royalty further argues that enforcement of the Natural Gas Act will not be affected by this case because fixed term leases are so rare. (Brief of Southland Royalty, p. 38.) This "rarity" also argues against the magnitude of the problems envisioned. If Texas and Louisiana are suggesting that violations of Section 7(b) must go undisturbed because of the ramifications of enforcing the statute, California must strongly disagree. Congress included Section 7(b) in the Natural Gas Act as part of a comprehensive regulatory scheme and it must be enforced.

3. Southland Royalty and Texas argue that the subject leases are so rare and impractical that up-

holding the Fifth Circuit Court of Appeals decision will not, from a policy standpoint, encumber the enforcement of the Natural Gas Act. (Brief of Southland Royalty, pp. 38, 43; Brief of Texas, pp. 17, 18.)

Whether the transaction before the Court is rare or common it merits enforcement under the Natural Gas Act. More importantly, both Southland Royalty and Texas, at the same time that they denigrate the Commission's concern for the Natural Gas Act, raise examples of lease arrangements that could release gas from sale in interstate commerce without Section 7(b) abandonment authorization and then attempt to distinguish these transactions. (Brief of Southland Royalty, p. 38; Brief of Texas, pp. 12, 13.) Southland Royalty argues that the case of *Pennzoil Producing Co. v. FPC,* 553 F.2d 485 (5th Cir. 1977), is clearly distinguishable from the instant case. The *Pennzoil* case involved the issue, initially, of whether a lease could be terminated and the gas produced under that lease withdrawn from sale in interstate commerce if the lease provision involving royalty payments was violated. Texas takes the unique position of citing such transactions;[8] referring to the Commission's position that the Section 7(b) abandonment requirement be enforced as a "covenant"; and then arguing that

[8] *Northern Natural Gas Co. v. Crawford,* FPC Docket No. CS71-6, issued September 29, 1975, appeal docketed *sub nom. Harrison v. FPC,* No. 76-4318 (5th Cir., Dec. 19, 1976), involving a producer owning a leasehold interest in six sections of land who released his interest in four of those six sections after beginning sales in interstate commerce from the other two sections; *Wessely Energy Corp. v. Arkansas-Louisiana Gas Co. and the FPC,* No. CIV-77-0159-B (W. D. Okla.), issued July 29, 1977.

this "covenant" will cause significant problems. The transactions raised by Respondent and Amici Curiae, all on appeal to higher courts, are the type of transactions that support the Commission's argument that the Fifth Circuit Court of Appeals' decision does in fact create a real danger to Section 7(b) of the Natural Gas Act.

CONCLUSION

For the reasons stated above, California believes that the policy arguments and fears of alleged harm raised in the briefs of Respondent and Amici Curiae as well as their attempts to discredit the Commission's concerns for the Natural Gas Act are without merit and should not be given weight in the instant case.

Respectfully submitted,

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Dated: December 2, 1977.